PROGRESSIVE INSURANCE SDN BHD

v.

RM INSURANCE UNDERWRITING AGENCY SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[SUIT NO: D2-22-2438-1989]
29 OCTOBER 2002

CONTRACT: *Insurance - Formation - Whether there was a contract in existence - Whether contract was breached - Whether plaintiff suffered loss as a result of breach - Whether burden of proof discharged*

TORT: *Defamation - Publication of alleged libelous statements in newspaper - Whether statements defamatory in nature - Whether plaintiff legally entitled to publish such statements - Whether defamation established*

This was a claim by the plaintiff, an insurance company, against the defendants for arrears of premium for a sum of RM1,441,556.75 arising out of a chief agency agreement between the plaintiff and the first defendant. As consideration, the second and third defendants, being the shareholders and directors of the first defendant, executed a letter of guarantee to guarantee and indemnify the payment of all insurance premiums due and owing to the plaintiff in respect of the chief agency agreement.

The plaintiff contended that the first defendant failed to remit insurance premiums to the plaintiff as stipulated under the said agreement. By mutual consent, the said agreement was terminated, and the plaintiff, by way of notice of advertisement in the Star Newspaper, notified the general public of the termination and repudiation of the assumption of risks undertaken by the first defendant. The defendants denied the claim on the grounds that the plaintiff's accounts, which formed the basis of the plaintiff's claim, were in error and that the plaintiff's termination was invalid and wrong in law. The defendants further averred that although the said agreement was terminated by mutual consent, and before the first defendant could agree to new terms, the plaintiff had falsely and maliciously published the said advertisement which contained words that were defamatory to the defendants, resulting in them suffering loss and damages. Hence, they filed a counterclaim in defamation against the plaintiff.

Held:

[1] On the facts, the defendants had, on a balance of probabilities, failed to cast any imputations on the statement of accounts as well as the summary

by transactions on the amount outstanding and due to the plaintiff. By way of evidence, it was proven, on a balance of probabilities, that there was a sum of RM1,441,556.75 outstanding from the defendants to the plaintiff which rendered the termination of the said agreement lawful and valid. (p 327 b-g)

[2] The plaintiff had, as required under s. 101 of the Evidence Act 1950, discharged the burden of proof for the following ingredients: (1) that there was a contract or agreement between the plaintiff and all the three defendants *vide* the chief agency agreement and the letters of guarantee; (2) that the defendants had breached the contract by failing to remit the premiums due to the plaintiff; and (3) that as a result of the said breach, the plaintiff suffered losses amounting to RM1,441,556.75 which were recoverable under s. 74(1) of the Contracts Act 1950. (p 328 g-i)

[3] The plaintiff, as a licensed insurance company, was bound by the provisions of the Insurance Act 1963 and other subsidiary legislation made thereunder, and was under a legal and social duty to publish the said advertisement for the necessary protection of the general public and also the plaintiff's own interest. The plaintiff was entitled by law to publish such an advertisement; it was also a privileged occasion for the plaintiff to do as such. (pp 331 h & 332 a)

[4] The defendants failed to prove the particulars of facts and matters relied upon in support of the claim, including the details of any conduct of the plaintiff which increased the loss suffered by each of the defendants or of any loss which was peculiar to the defendants' own circumstances. In any event, the question of damages would only have arisen if the defendants established its cause of action, which in this case, they have failed to do. Therefore, the question of damages did not arise. (pp 333 h & 334 b)

[Plaintiff's claim allowed; defendants' counterclaim dismissed.]

Case(s) referred to:
Adam v. Wardi [1917] AC 307 ***(foll)***
Ayob Samad v. TS Sambanthamurthi [1989] 1 MLJ 315 HC ***(refd)***
Daniel KC Tan v. Progressive Insurance Sdn Bhd [2001] 6 CLJ 361 HC ***(refd)***
John Lee & Anor v. Henry Wong Jen Fook [1981] 1 MLJ 108 FC ***(foll)***
Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(foll)***
Lee Kuan Yew v. JB Jeyaretnam [1982] CLJ 184; [1982] CLJ (Rep) 38 FC ***(refd)***
Syed Husin Ali v. Syarikat Percetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 HC ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 74(1)
Evidence Act 1950, ss. 62, 63, 101
Insurance Act 1963, ss. 14(a), 44A(3)(b)
Insurance Act 1996, s. 151(3)(b)

Other source(s) referred to:
Gatley on Libel and Slander, 6th edn, p 4
Gatley on Libel and Slander, 9th edn, p 666-668
Keith R Evans, *The Law of Defamation In Singapore and Malaysia*, 2nd edn, p 70

For the plaintiff - Muralee Menon; M/s Jaffar & Menon
For the defendants - Kemkumar S Lopez; M/s Kamaruddin & Partners

[The defendants have appealed to the Court of Appeal vide Civil Appeal No: W-02-859-2002]

Reported by Suresh Nathan

JUDGMENT

Ramly Ali J:
The plaintiff is and was at all material times an insurance company carrying on business as insurer in accordance with the Insurance Act 1963. The plaintiff's claim against the defendants is for arrears of premium as at 31 August 1989, for a sum of RM1,284,018.26 for Motor Insurance and RM157,538.49 for Non-Motor Insurance (total of RM1,441,556.75) arising out of a chief agency agreement dated 13 March 1987. The plaintiff and the 1st defendant entered into a chief agency agreement dated 13 March 1987 and in consideration of the plaintiff entering into the chief agency agreement, the 2nd and 3rd defendants, who were the shareholders and directors of the 1st defendant executed a letter of guarantee, to guarantee and indemnify the payment of all insurance premiums which shall be due and owing to the plaintiff in respect of the chief agency agreement. The plaintiff contends that in breach of the chief agency agreement the 1st defendant failed to remit insurance premiums to the plaintiff as stipulated under the said agreement.

By mutual consent, the said chief agency agreement was terminated as a result of the 1st defendant's breaches of the express terms, conditions and stipulations of the agreement. In furtherance to the said termination, the plaintiff has complied with s. 44A(3)(b) of the Insurance Act 1963 by way of a notice of advertisement in the Star Newspaper on 3 July 1989, thus notifying the general public on the termination and repudiation of the assumption of risks undertaken by the 1st defendant.

The defendants deny the claim on the grounds that the plaintiff's accounts, which form the basis of the plaintiff's claim are in error and that the plaintiff's termination was invalid and wrong in law. The defendants also filed their counter-claims against the plaintiff. The defendants' counter-claim is essentially one in defamation arising out of the said advertisement which appeared in the Star Newspaper on 3 July 1989. Each of the defendants claims from the plaintiff for aggravated damages, exemplary damages, general and special damages, interest and costs.

The following are *inter alia* the express terms and conditions of the chief agency agreement:

a) that the 1st defendant shall have the power to bind the plaintiff on insurance except reinsurance;

b) that the 1st defendant shall at all times transact all business on behalf of the plaintiff as chief agent of the plaintiff;

c) that the 1st defendant shall submit copies of all policies issued on behalf of the plaintiff together with the premium bordereau forthightly;

d) the mode of collection and payment of premiums to the plaintiff shall be of s. 14(A) of the Insurance Act 1963;

e) that all monies due to the plaintiff under any term of business transacted in the name of or on behalf of the plaintiff by the defendant shall be due and paid up to the plaintiff within 90 days from the issuance of the cover;

f) that the plaintiff may at any time terminate the said agreement if the 1st defendant is in breach of any of the terms and conditions of the said agreement by giving 14 days written notice to the 1st defendant.

The following are *inter alia* the express terms and conditions of the said letter of guarantee:

a) that the liability of the guarantors shall be joint and several on the arrears of both motor and non-motor insurance premiums due and owing from time to times by the 1st defendant and payable to the plaintiff in respect of the chief agency agreement;

b) that the guarantors agreed to unconditionally and irrevocably guarantee as principal debtors and not merely as sureties in the event for any reason whatsoever the said 1st defendant fails to cause the payment of insurance premium to the plaintiff on cover notes issued by the 1st defendant in furtherance to the said agreement;

c) that the guarantors to pay all such arrears of insurance premium for both motor and non-motor insurance cover under the agreement; and

d) that the guarantors agree to pay all monies as may be payable on the 1st defendants' account upon termination of the said agreement.

In the course of the trial, the plaintiff called five witnesses – namely: PW1 – a clerk at the agency department at the material times; PW2 – an executive in charge of underwriting department; PW3 – a senior manager (management information system); PW4 – former assistant manager (branch operation); and PW5 – the financial controller and company secretary of the plaintiff company. The defendants on the other hand, called three witnesses, namely; DW1 – the 3rd defendant; DW2 – the 2nd defendant and DW3 – former finance and administrative executive of the 1st defendant.

Plaintiff's Claim

The plaintiff's cause of action against the defendants is based on contract ie, the agreement between the plaintiff and the defendants. The plaintiff has to prove three elements, namely:

i) the existence of a contract or agreement;

ii) the breach of that contract or agreement; and

iii) the damages or loss suffered by the plaintiff as a consequence of the breach.

As between the plaintiff and the 1st defendant the relevant contract or agreement is the chief agency agreement (exh. P8). This exhibit was adduced by PW5. As between the plaintiff and the 2nd and 3rd defendants, the relevant agreement is the letters of guarantee signed by both the 2nd and 3rd defendant (exhs. P9A and P9B). These exhibits were adduced by PW5.

Clause 7(a) of the chief agency agreement clearly provides that all monies due to the plaintiff under any form of business transacted in the name of or on behalf of the plaintiff by the 1st defendant shall be due and paid up to the plaintiff within 90 days.

Pursuant to the chief agency agreement the 1st defendant issued and bound the plaintiff on both motor and non-motor insurance cover and the arrears of premium due and not paid up to the plaintiff as at 31 August 1989 amounts to RM1,441,556.75. The 1st defendant had failed to remit the said arrears of premium within the stipulated time period. The amount of the arrears was based on the summary of transactions between the plaintiff and the 1st defendant ie,

the account which was produced and marked as P2. As stated by PW5 in his examination-in-chief, the information in P2 was derived from the monthly statement of accounts rendered to the 1st defendant. These accounts, according to PW5, are audited by external auditors every year. DW3, who was the finance and administrative executive of the 1st defendant at the material times, agreed that he had received the statement of accounts. DW3 also confirmed that every statement of accounts had the following endorsement:

> The Company (Plaintiff) should be notified of any discrepancies in this statement in writing within fourteen (14) days from date hereof, otherwise we would assume that this statement is correct.

All the three defendants' witnesses (DW1, DW2 and DW3) could not produce a single letter notifying the plaintiff of any discrepancy in any of the monthly statement of accounts rendered to the 1st defendant. They were cross-examined on the issue but could not provide any form of evidence that challenged the statement of accounts. The defendants did try to introduce its own statement of accounts through DW3. The said statements of accounts was incomplete and not substantiated by any contemporary documents. There are only 21,000 transactions recorded in the said statement of accounts while the plaintiff's statement of accounts contained 32,000 transactions. In the plaintiffs statement of accounts, the amount in arrears was RM1,497,185.75 while in the incomplete defendants statement of accounts, the amount owing was RM524,629.29. Further more the defendant's statement of accounts was prepared and served on the plaintiff on 12 October 2000 ie, 11 years after the present suit was commenced.

The defence tried to raise some discrepancies in the summary of transactions or statement of accounts of the plaintiff in order to show that it was bad on the face of it. However, in cross-examination of DW3 the court is satisfied that all those alleged discrepancies were unfounded. In the final analysis there are no discrepancies. What is more perplexing is that, despite alleging that the summary of accounts of the plaintiff is a fabrication, DW3 who claimed to be a qualified accountant, could not explain why the said summary of accounts of the plaintiff and the defendant's very own reconciliation accounts tallied in respect of the alleged discrepancies. The summary of transactions between the plaintiff and the 1st defendant as produced by the plaintiff is derived from the computer system of the plaintiff. Evidence to that effect was led through PW3 and PW5. The documents authencity was not effectively challenged. Sections 62 and 63 of the Evidence Act 1950 makes clear what is primary and secondary evidence. Computer printouts (as in the present case) is deemed primary evidence. The plaintiff's witnesses PW1, PW2, PW3 and PW5 did take part in the preparation of the accounts in question, culminating in the summary of

transactions. They were called as witnesses to show the chain of evidence in respect of the accounts. The defence has not effectively challenged their evidence.

The plaintiff has explained with unequivocal evidence about the monthly accounts as well as the summary of transactions. PW3 has explained that the said documents were produced from the plaintiff's computer with a certificate and PW5 has verified the accounts. As explained by the plaintiff's witnesses, the summary of transactions are accounts presented in its entirety as opposed to a monthly statement. It is a reflection of all accounting transactions between the plaintiff and the 1st defendant as carried out in the accounting computer system of the plaintiff. It is audited by external auditors and that of Bank Negara Malaysia. Until the end of the trial, the court is satisfied that the defendants has failed to produce any accounts of their own to rebut the plaintiff's accounts. Therefore the court is also satisfied that the defence has, on the balance of probabilities, failed to cast any imputation on the statement of accounts as well as the summary by transactions on the amount outstanding and due to the plaintiff.

By way of evidence it has been proven, on the balance of probabilities, that there was a sum of RM1,441,556.75 outstanding from the defendants to the plaintiff. Surely this is a flagrant breach of the covenant as found in cl. 7(a) of the agency agreement (exh. P8). Clause 14(b) of the same agreement provides that the plaintiff may at anytime terminate the agreement if in its opinion the chief agent (1st defendant) is in breach of any terms of the agreement. In *Daniel KC Tan v. Progressive Insurance Sdn Bhd* [2001] 6 CLJ 361 the court held:

> The failure of the plaintiff to transmit the collected premium within the stipulated 90 days pursuant to Clause 7 would in itself entitle the defendant to terminate the Agreement forthwith.

Further more, in para. 8 of its statement of defence, the defendants admit that the said agreement was terminated by mutual consent. Therefore the court is satisfied that the said termination of the chief agency agreement is lawful and valid.

Plaintiff's Witnesses

Through PW1, PW2 and PW3 the plaintiff has adduced evidence of the internal procedure in processing insurance policy until the preparation of the statement of accounts in a summary form. Through PW4, the plaintiff adduced evidence of the surrounding circumstances leading to the termination of the 1st defendant as a chief agent under the agreement. Through PW5 the original letters of guarantee (P9 A-B) were adduced. All the five plaintiff's witnesses were

cross-examined by the defendants' counsel. They withstood the test of creditability and consistency. There were no contradictory evidence between their oral evidence and contemporaneous documents.

Defendant's Witnesses

The defendants called three witnesses – two directors of the 1st defendant who are also the 2nd and 3rd defendants (DW1 and DW2); and an ex-employee of the 1st defendant who was the finance and administrative executive (DW3). DW1 was so inconsistent and evasive. During cross-examination of DW1, the court ordered DW2 out of the court room for giving hand signals to DW1 to assist DW1 in giving his testimony. Similarly the evidence of DW2 and DW3 were equally inconsistent. The court observed that they were not truthful, often evasive and caught lying. This is even so with DW3. After having given evidence-in-chief so confidently, he fumbled in cross-examination. DW3 seems to be a very biased and interested witness. He would readily answer questions if the answer is to the defendants' advantage. An accounting graduate, he could not explain what is a due diligence audit. He could not or would not explain what a 'debit' and 'credit' entry was. In cross-examination, DW3's evidence was torn a part. What is more disturbing is DW3 continued to be untruthful. At p. 383 of IDD1, despite clear documentary evidence that in the accounts of the plaintiff that the amount of the arrears showed RM1,497,185.75 and in the defendant's account (prepared by himself) showed RM524,629.29, DW3 denied that there was any amount due and owing at all by the 1st defendant to the plaintiff. The defendant accounts was prepared by the defendant through DW3, yet DW3 denied the amount shown outstanding in the defendant's account. From the court observation through out the proceedings, DW3 is not a truthful witness who remembered only matters where the defence relies upon and not material issues when raised in cross-examination.

Conclusion Of Plaintiff's Claim

Based on the above consideration, the plaintiff has, as required under s. 101 of the Evidence Act 1950, discharged the burden of proof for the following ingredients:

i) that there was a contract or agreement between the plaintiff and all the three defendants *vide* the chief agency agreement and the letters of guarantee;

ii) that the defendants had breached the contract by failing to remit the premiums due to the plaintiff;

iii) that as a result of the said breach the plaintiff suffered losses amounting to RM1,441,556.75 as at 31 August 1989 and recoverable under s. 74(1) of the Contracts Acts 1950.

Therefore the plaintiff's claim against all the defendants is allowed with costs.

Defendants' Counter Claim

The defendants' counter claim against the plaintiff is set out in paras 9-16 of the statement of defence, essentially one in defamation. The defendants aver that the plaintiff's notice of termination dated 1 April 1989 is invalid and wrong in law and not in accordance with the terms of the agreement. The defendants further aver that although the said agreement was terminated by mutual consent and before the 1st defendant could agree to new terms, the plaintiff falsely and maliciously caused to be published in the Star Newspaper and national daily newspaper on 3 July 1989 of and concerning the 1st defendant the following words (which the defendants claimed to be defamatory):

> The public is hereby notified that with effect from 1st May 1989, we have terminated our Agency Agreement dated 13th March, 1987 with RM Insurance Underwriting Agency Sdn Bhd, Lot 336, 12th Floor, Campbell Complex, Jalan Dang Wangi, 50000 Kuala Lumpur.
>
> They are no longer authorized to undertake and transact business on our behalf and all cover notes in their possession are therefore declared null and void.

The defendants claimed that the innuendo placed upon these words was that the 1st defendant's agency with the plaintiff had been terminated for some reason discreditable to the 1st defendant. The defendants further aver that the notice advertised was excessive and was not called for by the requirements of the occasion, and the words used were calculated to disparage the 1st defendant in their business of insurance agent and generally companies in the RM group of companies of which the 1st defendant is part of and of which the 2nd and 3rd defendants are directors and shareholders. In consequence of the said advertisement, the defendants claimed that they have been greatly injured in their credit and reputation and in their business and profession and have been brought into public odium, ridicule and contempt and has suffered loss and damage.

The plaintiff, on the other hand, argued that those words used in the said advertisement were not defamatory in nature against the defendants. In the alternative the plaintiff aver that the words used is a fair comment made in good faith and without malice upon a matter of public interest namely upon the conduct of the 1st defendant as a chief agent in having failed to comply with the statutory provisions of the Insurance Act 1963 and in breach of the terms and conditions of the chief agency agreement. Alternatively, the plaintiff claimed that in compliance with the statutory provisions of s. 44A(3)(b) of the Insurance Act 1963, the plaintiff has a legal and/or social duty to publish the

said words in the said advertisement in the reasonable and necessary protection the general public and the plaintiff's own interest.

In *Ayob bin Samad v. TS Sambanthamurthi* [1989] 1 MLJ 315, His Lordship Mohamed Dzaiddin J (now CJ) has clearly laid down the necessary procedure in establishing claim for libel, when he said (at p. 316):

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show:
>
> (1) the words are defamatory;
>
> (2) the words refer to the plaintiff; and
>
> (3) the words were published.
>
> Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the Plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged: *Rajagopal v. Rajan.*
>
> In other words, the plaintiff must prove (3) elements of the tort of defamation, which are:
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> (i) the plaintiff must show that the statement bears defamatory imputations,
>
> (ii) the statement must refer to or reflect upon the plaintiff's reputation; and
>
> (iii) the statement must have been published to a third person by the defendant.

What Is "Defamatory Imputation"?

There is no precise test applied to determine whether or not any given words are defamatory. His Lordship Mohamed Azmi J in the case of *Syed Husin Ali v. Syarikat Percetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p. 58 quoting *Gatley on Libel and Slander*, 6th edn, p. 4 stated the following:

> There is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend 'to lower the plaintiff in the estimation of right-thinking members of society generally', 'to cut him off from society' or 'to expose him to hatred, contempt or ridicule', is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published.

It was further quoted that:

> A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to it tendency.

The first ingredient that the defendant must prove is that the words used in the said advertisement are defamatory in nature. Applying the test as laid down in the above authorities, the court finds nothing defamatory about the contents of the said advertisement. The said advertisement was merely issued to inform the general public that the agency agreement between the plaintiff and the 1st defendant has been terminated with effect from 1 May 1989 and that the 1st defendant was no longer authorised to undertake and transact business on behalf of the plaintiff. It is merely for the protection of the public. There is no question of any malice on part of the plaintiff. There is no innuendo to suggest that the said agreement was terminated for some reason discreditable to the 1st defendant as alleged by the defendants.

In *Kian Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32, it was said:

> In determining the issue, this court does not look to the actual effect of the allegations on the person's reputation, or the meaning of the words actually understood or taken by the listeners, (see: *JB Jayaretnam v. Goh Chok Tong* [1985] 1 MLJ 334). It is not enough that the listeners actually take the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory, (see *The Straits Times Press (1975) Ltd v. The Workers' Party & Ano*r [1987] 1 MLJ 186).

In the present case, the defendants have not adduced any evidence to show in what way or how the said advertisement is defamatory or even have imputed that the listeners actually took the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they can be said to be defamatory. The defendants called no witness to show that the words complained of are defamatory.

The plaintiff, as a licensed insurance company is bound by the provisions of the Insurance Act 1963 and other subsidiary legislations made thereunder. The plaintiff was under a legal and/or social duty to publish the said advertisement for the necessary protection of the general public and also the plaintiff's own

interest. The plaintiff was entitled by law to publish such advertisement. It is a privileged occasion for the plaintiff to do so. Lord Atkin in the case of *Adam v. Wardi* [1917] AC 307 at p. 334 has stated:

> A privilege occasion is an occasion ... where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.

The above authority was referred to by the Federal Court in *John Lee & Anor v. Henry Wong Jen Fook* [1981] 1 MLJ 108, where it was held:

> Where a statement made by a person having a legal duty to make it and the recipient has a corresponding interest or duty to receive it, such communication is privileged.

Another form of statement which is privileged is statement made in protection of self interest. Author Keith R Evans in his book "*The Law of Defamation In Singapore and Malaysia*", 2nd edn, at p. 70 states that statements, although defamatory and not true, may be subject to privilege if the plaintiff can show that they were made in the conduct of its affair, in the protection of his own interest as long as the statements are relevant to the subject matter in question provided the statements are made *bona fide* and are fairly relevant to the accusation made against that person (citing the case of *Lee Kuan Yew v. JB Jeyaretnam* [1982] CLJ 184; [1982] CLJ (Rep) 38).

In the present case, the plaintiff relies on s. 44A(3) of the Insurance Act 1963 (now s. 151(3)(b) of the Insurance Act 1996) which provides:

> (1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.
>
> (2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of section 16A or any other provision of this Act by such person.
>
> (3) This section shall not apply:
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> (a) where there is collusion or connivance between such person and the proposer in the formation of the contract; or

(b) where such person has ceases being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation.

It is the finding of the court that the said advertisement published by the plaintiff was published *bona fide* and without malice. By doing so, the plaintiff was not only trying to protect the interest of the general public but also the interest of the plaintiff who might be unnecessarily be bound by whatever transactions entered into by the 1st defendants with any potential insured after the termination of the chief agency agreement. It was made in the conduct of the affair of the plaintiff as a licensed insurance company, who is bound by the provisions of the Insurance Act 1963.

DW1 gave evidence that he is claiming RM3 million ie, RM1 million each for 1st, 2nd and 3rd defendants as damages suffered as a result of the alleged defamatory advertisement. However he had not adduced any evidence at all to show how he derived at the figures. Cross-examination of DW3 revealed that the 1st defendant was incurring heavy losses from 1987 – ie, loss of RM187,900. In 1988, the net loss was RM472,902. All this showed that the 1st defendant was actually in bad financial situation even prior 3 July 1989 (the date of the advertisement).

In *Gatley on Libel and Slander*, 9th edn, at pp. 666-668, it is stated that in an action for libel if the defendants claim to have suffered an injury going beyond the normal damages which is presumed to follow in the ordinary course of defamatory publication, he must give particulars of facts and matters relied upon in support of the claim, including details of any conduct by the plaintiff (in the present case) which has increased the loss suffered and of any loss which is peculiar to the defendants own circumstances. Where the defendants (in the present case) claims to have suffered financial loss, they must allege such damages, including a general falling-off business, otherwise he will not be able to give evidence of such damages at the trial (see also; *Kian Lup Construction v. Hong Kong Bank Malaysia Bhd (supra)*).

In the present case the defendants did not give any particulars of damages to support their claim in their statement of counterclaim. The defendants had also failed to adduce any evidence as to the damages suffered by them. DW1 just say that they are claiming for RM3 million ie, RM1 million for each of the 1st, 2nd and 3rd defendants, from the plaintiff. The sum claimed seem to show that the defendants are claiming to have suffered damages going beyond the normal damages which is presumed to follow in the ordinary course of defamatory publication, and therefore it must be proved by evidence. Failure to do so will cause the claim to fall. The defendants must prove the particulars

of facts and matters relied upon in support of the claim, including details of any conduct by the plaintiff which has increased the loss suffered by each of the defendants or of any loss which is peculiar to the defendants own circumstances. The defendants have failed to do so.

In any event, the question of damages only arises when the defendants have proved or established its cause of action for the alleged defamation by the plaintiff. In this case, the court has concluded earlier that the defendants have failed to do so. Therefore the question of damages in this case does not arise.

Conclusion On The Counter-Claim

From the above facts, evidence and law, the court is satisfied that the defendants have failed to establish their counter-claim for defamation against the plaintiff. The defendants have also failed to prove any damage suffered by them as a result of the alleged defamation. Therefore the defendants counter claim is dismissed with costs.